Supreme Court, U. S.
FILED
DEC 28 1978
DAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1042

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN C. WATSON, Director of the Department of Registration and Education, and the ILLINOIS STATE DENTAL SOCIETY,

Respondents,

vs.

ALAN SPINKA, individually and doing business as NORTH GRAND DENTAL LABORATORY and B & S DENTAL LABORATORY,

Petitioners.

ALAN SPINKA, on his own behalf, and on behalf of all other persons similarly situated,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN C. WATSON, Director of the Department of Registration and Education, and the ILLINOIS STATE DENTAL SOCIETY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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I Whether the State of Illinois by the action of the Supreme Court of Illinois in denying a petition for appeal as a matter of right under Article 6, Section 4(c), of the Constitution of the State of Illinois, from a judgment of the Appellate Court of Illinois, involving a question under the Constitution of the United States that arose for the first time in and as the result of the action of that court on an appeal as a matter of right under Article 6, Section 6, of the Constitution of the State of Illinois, involvin a separate question under the Constitution of the United States that was raised in and passed on by the trial court adversely to Petitioners, i.e., that the Illinois Dental Surgery Act is arbi-

trary and unreasonable and unconstitutional and void to the extent it has deprived them of their right and liberty to earn a living practicing their profession of dental therapy in that said deprivation is a deprivation of their property and liberty without due process of law, and a denial to them of the protection and equal protection of the laws, in violation of the Constitution of the United States and of the Constitution of the State of Illinois, in affirming the judgment of the trial court without passing on the constitutional issues, has deprived them of their procedural rights and property and liberty without due process of law, and has denied them the protection and equal protection of the laws, in violation of their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States, separate and apart from the earlier constitutional issues. 5

II Whether the State of Illinois by the action of the Supreme Court of Illinois in denying a petition for appeal as a matter of right under Article 6, Section 4(c), of the Constitution of the State of Illinois, and the Judgment of the Appellate Court of Illinois, in affirming the judgment of the trial court without passing on the constitutional issues raised in and passed on by the trial court, has violated the fundamental principle that when a case involves the punishment of the defendant for

a crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings because the question is a jurisdictional question and considerations of justice and fairness compel that result, and it necessarily follows that the judgment of the Supreme Court of Illinois in denying a petition for appeal as a matter of right under Article 6, Section 4(c), of the Constitution of the State of Illinois, and the judgment of the Appellate Court on the appeal as a matter of right under Article 6, Section 6, of the Constitution of the State of Illinois, in failing to consider the issue of the validity of the Dental Surgery Act, and the issue of the validity of the prosecution being carried on by any prosecutor other than the attorney general or the state's attorney, which were raised in and passed on by the trial court adversely to Petitioners, deprived Petitioners of their right to appeal as a matter of right and procedural rights without due process of law, and denied them the protection and equal protection of the laws, in violation of their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States. 7

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

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PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN C. WATSON, Director of the Department of Registration and Education, and the ILLINOIS STATE DENTAL SOCIETY,

Respondents,

vs.

ALAN SPINKA, individually and d/b/a NORTH GRAND DENTAL LABORATORY and B & S DENTAL LABORATORY,

Petitioners,

ALAN SPINKA, on his own behalf and on behalf of all other persons similarly situated,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN C. WATSON, Director of the Department of Registration and Education, and the ILLINOIS STATE DENTAL SOCIETY,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

==========

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

ALAN SPINKA, on his own behalf, and on behalf of all other persons similarly situated, Petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois denying a petition for appeal as a natter of right, and not as a matter of discretion, from a judgment of the Appellate Court of Illinois, First Judicial District, affirming a judgment of the Circuit Court of Cook County, Illinois, finding him guilty of a direct criminal contempt for violation of a permanent decree of injunction enjoining him from practicing dentistry without a license, sentencing him to ten days confinement in the county jail, and assessing costs against him in the sum of $1,000, after first granting a motion to

strike and dismiss his affirmative defense and their cross-complaint that the Illinois Dental Surgery Act is arbitrary and unreasonable and unconstitutional and void to the extent it has deprived them of their right and liberty to earn a living practicing their profession of dental therapy in that said deprivation is a deprivation of their property and liberty without due process of law, and a denial to them of the protection and equal protection of the laws, in violation of the Constitution of the United States and of the Constitution of the State of Illinois, on the ground that the constitutional issues are not well taken and are insufficient to constitute a defense, but the Appellate Court refusing to pass on the constitutional questions, on the ground that they had been waived and could not constitute a defense to the charge of criminal contempt for violation of an order of a court of chancery.

No opinion was written by the Supreme Court of Illinois. The October 18, 1978---- No. 20 Official Reports Illinois Supreme And Appellate Courts Combined Advance Sheets under the heading: "Disposition Of Petitions For Leave To Appeal September Term, 1978", at Page lvi states:

"(50725) People ex rel. Watson v. Spinka ..... Denied."

The opinion of the Appellate Court is published as 58 Ill.App.3d 729. It is set out in the Appendix.

JURISDICTION

The date of the judgment of the Supreme Court of Illinois sought to be reviewed is September 28th, 1978, and the time of entry was 0930 A.M..

The jurisdiction of this Court is invoked under Title 28, Section 1257(3) of the United States Code.

QUESTIONS PRESENTED FOR REVIEW

I

Whether the State of Illinois by the action of the Supreme Court of Illinois in denying a petition for appeal as a matter of right under Article 6, Section 4(c), of the Constitution of the State of Illinois, from a judgment of the Appellate Court of Illinois, involving a question under the Constitution of the United States that arose for the first time in and as the result of the action of that court on an appeal as a matter of right under Article 6, Section 6, of the Constitution of the State of Illinois, involving a separate question under the Constitution of the United States that was raised in and passed on by the trial court adversely to Petitioners, i.e., that the Illinois Dental Surgery Act is arbitrary and unreasonable and unconstitutional and void to the extent it has

deprived them of their right and liberty to earn a living practicing their profession of dental therapy in that said deprivation is a deprivation of their property and liberty without due process of law, and a denial to them of the protection and equal protection of the laws, in violation of the Constitution of the United States and of the Constitution of the State of Illinois, in affirming the judgment of the trial court without passing on the constitutional issues, has deprived them of their procedural rights and property and liberty without due process of law, and has denied them the protection and equal protection of the laws, in violation of their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States, separate and apart from the earlier constitutional issues.

II

Whether the State of Illinois by the action of the Supreme Court of Illinois in denying a petition for appeal as a matter of right under Article 6, Section 4(c), of the Constitution of the State of Illinois, and the Judgment of the Appellate Court of Illinois, in affirming the judgment of the trial court without passing on the constitutional issues raised in and passed on by the trial court, has violated the fundamental principle that when a case involves the punishment of the defendant for a crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings because the question is a jurisdictional question and considerations of justice and fairness compel that result, and it necessarily follows that the judgment of the Supreme Court of Illinois in

denying a petition for appeal as a matter of right under Article 6, Section 4(c), of the Constitution of the State of Illinois, and the judgment of the Appellate Court on the appeal as a matter of right under Article 6, Section 6, of the Constitution of the State of Illinois, in failing to consider the issue of the validity of the Dental Surgery Act, and the issue of the validity of the prosecution being carried on by any prosecutor other than the attorney general or the state's attorney, which were raised in and passed on by the trial court adversely to Petitioners, deprived Petitioners of their right to appeal as a matter of right and procedural rights without due process of law, and denied them the protection and equal protection of the laws, in violation of their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States.

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES WHICH THE CASE INVOLVES.

The Constitution of the United States, 14th Amendment, Section 1:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Illinois Revised Statutes 1977, Vol. 1, Pages 6 and 7.

The Constitution of the State of Illinois, Article 6, Section 4:

> "(c) Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court, * * * . The Supreme Court may provide by rule for appeals from the Appellate Court in other cases."

Illinois Revised Statutes 1977, Vol. 1, Page 18.

The Constitution of the State of Illinois, Article 6, Section 6:

> "Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in which the Circuit Court is located except in cases appealable directly to the Supreme Court * * *. * * * "

Illinois Revised Statutes 1977, Vol. I, Page 18.

The Constitution of the State of Illinois, Article 6, Section 9:

> "Circuit Courts shall have original jurisdiction of all justie iable matters * * * ."

Illinois Revised Statutes 1977, Vol. 1, Page 18.

Illinois Revised Statute 1977:

Chapter 37 - Section 32.1 -Vol. 1, Page 1628:

> "In all cases, other than those appealable directly to the Supreme Court as provided by Section 4 of Article VI of the Constitution or by rule of the Supreme Court, appeals from final judgments of a circuit court lie as a matter of right to the appellate court in the district in which the circuit court is located * * * ."

Chapter 37 - Section 32.2 -Vol. 1, Page 1628:

> "Appeals from the appellate court shall lie to the Supreme Court as a matter of right only (a) in cases in which a question under the Constitution of the United States or of this state arises for the first time in and as a result of the action of the appellate court, * * * ."

Chapter 110A - Section 317 (Su-

preme Court Rule 317) - Vol. 3, Pages 60-61:

> "Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition * * * entitled 'Petition for Appeal as a Matter of Right' * * * ' * * * "

Illinois Revised Statutes 1977 - Vol. 3, Chapter 111, Section 2244, Page 272:

> "The practice of dentistry by any person who has not been duly licensed so to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts enumerated in Sections 5a, 18, 18a and 18b by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance. The Attorney General for State of Illinois, the State's Attorney for any county in the State, or any resident citizen may maintain an action in the name of the people of the State of Illinois to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act. In all proceedings hereunder the

> court, in its discretion, may apportion the costs among the parties interested in the suit, including cost of filing complaint, service of process, witness fees and expenses, court reporter charges, reasonable attorneys fees. This proceeding shall be in addition to and not in lieu of criminal prosecutions or proceedings to revoke or suspend licenses as authorized by this Act. As amended by act approved Aug. 24, 1965. L.1965, p. 3597."

STATEMENT OF THE CASE

On July 28th, 1966, the People of the State of Illinois ex rel. John C. Watson, Director of the Department of Registration, filed a complaint in chancery in the Circuit Court of Cook County, Illinois, against the Petitioner SPINKA and others under Section 17a of the Illinois Dental Practice Act, just stated. The complaint stated that the said Petitioner and others had been engaged in the business of furnishing, selling, supplying, instructing, reproducing or repairing prosthetic dentures (sometimes known as 'plate'), bridges, or other substances or replacements for natural teeth or offer to do

same, and other acts in violation of the statute. On March 29th, 1968, a decree of injuction was entered enjoining him from practicing dentistry without a license by doing the acts prohibited. It was issued on a stipulation of the parties. The present petition against Petitioner was filed November 24th, 1975. It prayed that he be held in contempt of court for violating thedecree. He filed a motion to strike the rule to show cause and a plea of not guilty and a demand for a jury trial, his motion to strike being made on the ground among others that the contempt, if it was a criminal contempt, is not being prosecuted by the Attorney General or the State's Attorny, and he is being deprived of his rights in violation of the 14th Amendment, Section 1, and under the Constitution of the State of Illinois. On August 31st, 1976, defendant filed his affirmative defense, that the Dental statute was arbitrary and unreasonable and unconstitutional under the

Constitution of the United States, 14th Amendment, Section 1, and the Constitution of the State of Illinois. He prayed discovery. The Circuit Court held that the statute was constitutional, and struck the defense and counterclaim, and sentenced him to be confined in the county jail for ten days. The statement of facts in the opinion of the Appellate Court is basically fair but the Court fails to point out that the petitioner SPINKA submitted himself to the jurisdiction of the court, and offered to do equity, and to comly with any standards similar to the standards of the Provence of Ontario under The Denture Therapits Act, 1974, that it might institute pending adoption of the licensing procedures, regulations, education and discipline by the legislature, the Ontario statutes being attached to and incorporated in the affirmative defense and cross-complaint, and stated that in view of those statutes and an article also attached to and incorporated in the affirmative defense and cross-complaint.

there is reason to believe full discovery would establish other reasons why the Courts should recognize the denture therapist and the denturist as a member of a professional group independent of the dental profession, and in addition, that Respondents did not come into court with clean hands nor offer to do equity. The Court struck and dismissed the affirmative defense and counterclaim, and sentenced him as stated earlier in this petition. The Appellate Court affirmed but refused to pass on the constitutional questions. Petitioners filed a petition for rehearing raising the issue that Petitioners had a right to a decision on their counterclaim regardless whether the unconstitutionality of the statute was a defense to the criminal contempt, and to consideration and decision of the constitutional issue raised as to the prosecution being carried on by the Attorney General, or by a state's attorney, and that the Court had violated his rights under the 14th Amendment and Illinois Constitution in failing to pass on the con-

stitutional issues passed on by the trial court. The petition was denied.

Petitioners filed a timely petition for appeal as a matter of right to the Supreme Court of Illinois including the points relied on that arose for the first time in and as a result of the action of the Appellate Court refusing to pass on the constitutional issues passed on adversely to Petitioners in the trial court.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The judgment of the Appellate Court, and the judgment of the Supreme Court denying the petition for appeal as a matter of right, violate the fundamental principle that when a case involves the punishment for a crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings because it is jurisdictional in nature.

There is no doubt that violation of an injunction or restraining order which is valid and operative is punishable as a contempt of court, and the termination of an injnction or restraining order does not necessarily relieve from liability for a violation of the injunction or order while it was in force, at least where the proceeding for violation is one for criminal contempt. A valid injunction or restraining order must be obeyed while it is in full force and effect, until overturned. The fact that an injunction or restaining order is merely erroneous does not of itself excuse a violation of such injunction or order; but disobedience of a void injunction or restraining order is not punishable contempt of court.

43A CJS 632-633 states:

> "In general, it is only when the court which grants or makes the injunction or restraining order does not have

> jurisdiction that such injunction or order may be disregarded and cannot be made the basis of a contempt proceeding. * * * It has been held or recognized, however, that an injunction is void and, therefore, insufficient as the basis of punishment for contempt if it has no support of any applicable law, or when the court is without jurisdiction to grant the particular restraining order. * * * Where an injunction exceeds the jurisdiction of the issuing court, a person affected by the injunction has the choice of complying with the order and bringing a judicial challenge, or disobeying it and subsequently attacking its validity when he is charfed with contempt.'

In Commonwealth v. Hans, 1907, 195 Mass 262, at page 264, the Court held that:

> "When a case involves the punishment of the defendant for a crime, the constitutionality of the statute authorizing the prosecution may be questioned a any stage of the proceeding."

In State of Diamond, 1921, 27 N.M. 477, in the Syllabus, the Court held that:

> "Where an act creating a crime is found to be unconstitutional, the question may be raised for the first time on appeal."

At page 488, the court said:

> "Here the question of the constitutionality of the act involved determines whether a crime has been committed.

If the law is void, no crime has been committed and none can be committed under it, and the court has no jurisdiction over the person of the defendant or the subject matter of the cause. It is a proceeding to punish a man where there is no law authorizing the same. In such a case it would seem that the question is jurisdictional and may be raised for the first time on appeal and we so hold. See, in this connection, Schwartz v. People, 47 Colo. 483, 104 Pac. 92; State v. Gibson, (Iowa) 174 N.W. 34; and State v. Winehill & Rosenthal, 147 La. 781, 86 South, 181."

In People v. Sarelli, 1973, 55 Ill.2d 169, at page 170, the Court held:

"Petitioner * * * contends that because the statute under which he was convicted has been held unconstitutional the judgment dismissing his post-conviction petition must be reversed, and the cause remanded with directions to vacate the judgment of conviction. The People contend that because petitioner did not, during the trial or appeal of his original conviction, raise the issue of unconstitutionality of the statute, and did not argue the issue in the hearing of his post-conviction petition in the circuit court, the contention is waived and may not be considered on appeal.

"In Hudson/ 50 Ill. 2d 1/ we allowed leave to appeal and under authority of McCabe / 49 Ill.2d 338/ reversed the judgment of the appellate court

(130 Ill.App.2d 1033) even though the issue of the validity of the Narcotic Control Act was not raised in the appeal. We have not, however, previously considered the question of whether the holding invalid of the statute upon which a conviction rests requires vacation of the judgment when the issue of its constitutionality is raised for the first time in a post-conviction proceeding. * * *

"* * * considerations of justice and fairness compel the conclusion that the question presented in this case can be raised for the first time in a post-conviction proceeding and we hold, therefor, that there was no waiver."

The Court missed the jurisdictional question there just as it did in denying the petition for appeal as a matter of right. The Appellate Court was required to consider the constitutional question raised in and passed on by the Circuit Court because if the statute is unconstitutional Respondent Spink cannot be confined or otherwise punished by the Court without violating his Federal rights under the 14th Amendment, Section 1, for want of jurisdiction.

The case of Cummings-Landau Laundry Machinery Co. v. Koplin, 1944, 386 Ill. 368,

is applicable to this case in two respects: itsupports our argument that a constitutional question arose for the first time in the Appellate Court in and as the result of the action of that court and was reviewable in the Supreme Court of Illinois; and our argument that if the Dental Surgery Act is unconstitutional, and we cannot know the answer to that question if a Court will not inquire, petitioner SPINKA cannot be held in criminal contempt for want of jurisdiction.

Here the jurisdiction of the court depends on the validity of a statute. We are not dealing with a nuisance per se. 39 Am Jur "Nuisance" §100, page 365 states:

> "The practice of medicine and surgery is not per se a nuisance, and neither is the treatment of disease according to the chiropractic method.
>
> "The practicing of medicene or dentistry without a license has been held to be a public nuisance. According to some courts, it is not a nuisance per se or in itself, but may be enjoined as a public nuisance where the defendant is unskilled or incompetent. It has been held that equity will not enjoin a common nuisance a person from practicing medicine merely because he has failed to take the required examination and obtain a license, in violation of the penal laws of the state."

It follows that the Dental Surgery Act is the source of the jurisdiction of the chancery court to issue an injunction, and not its inherent power as a court of equity. The validity of the injunction disobeyed by Petitioner SPINKA is based exclusively on the statute, and if the statute is void as applied to him, he cannot be held in contempt for disobeying the injunction, without violating his Federal rights under the 14th Amendment, Section 1.

The other constitutional issue stated in this petition is of equal merit.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

Hugh M. Matchett

HUGH M. MATCHETT
Petitioners Attorney

APPENDIX

FIFTH DIVISION
March 10, 1978

APPENDIX

No. 76-1478

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN C. WATSON, Director of the Department of Registration and Education, and the ILLINOIS STATE DENTAL SOCIETY, Plaintiffs-Appellees, vs. ALAN SPINKA, individually and d/b/a NORTH GRAND DENTAL LABORATORY and B & S DENTAL LABORATORY, Defendant-Appellant, ALAN SPINKA, on his own behalf and on behalf of all other persons similarly situated, Cross-Plaintiff-Appellant, vs. PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN C. WATSON, Director of the Department of Registration and Education, and the ILLINOIS STATE DENTAL SOCIETY, Cross-Defendants-Appellees	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HONORABLE DANIEL A. COVELLI, PRESIDING.

Mr. JUSTICE LORENZ delivered the opinion of the court:

Defendant, Alan Spinka, appeals from an order dismissing his affirmative defense and counterclaim, finding him to be in contempt of an injunction which prohibited him from practicing dentistry in the State of Illinois without a license, and sentencing him to ten days in the Cook County Jail and an assessment of $1,100 in costs.

On appeal he contends that: (1) the trial court's order, as well as the original injunction itself, should be declared unconstitutional and void, (2) the trial court erred in not granting his motion to strike plaintiffs' petition for rule to show cause why he should not be held in contempt, and (3) the prosecution was improperly instituted.

The following facts are pertinent to the disposition of this appeal.

On July 28, 1966, the State upon the relation of the Department of Registration and Education filed a complaint against Wilbert Bochte, Alex Stefanek, and defendant Alan Spinka, alleging that they were engaging in the practice of dentistry as a regular course of business without being properly licensed to do so. The complaint specifically alleged, inter alia, that defendants had represented themselves as being able to diagnose, treat or prescribe for certain deficiencies or physical conditions of the human teeth, gums or jaw; had managed or operated a place where dental operations were performed; had taken impressions of the human teeth or jaws incident to replacing teeth or associated tissues by means of a filling, crown, bridge, or denture or other appliance; had performed other dental operations; and had furnished, supplied, constructed, reproduced or repaired prosthetic dentures, bridges, or other substitutes for natural teeth to the user thereof. Defendants were therefore alleged to be in violation of section 3 and section 5 of the Dental Practice Act (Ill. Rev. Stat. 1965, ch. 91, pars. 58, 60), which, respectively, provides that no person shall practice dentistry in the State of Illinois without first obtaining a license to do so from the Department of Registration and Education, and sets forth the type of activities which constitute the practice of dentistry:

On March 29, 1968, a consent decree was entered by the trial court permanently enjoining Spinka from engaging in the practice of dentistry and performing various stated dental operations without a license. It specifically reserved jurisdiction in the trial court to enforce the terms of the injunction.

On August 11, 1972, plaintiff filed a petition for rule to show cause why Spinka should not be held in contempt for violating the terms of the injunction. A stipulation was then entered into whereby it was agreed that the Illinois State Dental Society would be given leave to intervene as an additional plaintiff-relator, and that costs would be awarded to the State of Illinois in the sum of $300, to be paid within five days, and to the Illinois State Dental Society in the sum of $1,500 to be paid 1/3 within 30 days, 1/3 within 60 days, and the balance within 90 days. The trial court entered an order conforming to the stipulation and the petition was withdrawn.

On May 1, 1974, plaintiffs filed a new petition for a rule to show cause why Spinka should not be held in contempt for his willful violations of the 1968 injunction. The petition, with attached affidavits, described the new violations. After Spinka was served, the court continued the petition and, subsequently, granted plaintiffs' motion to withdraw it without prejudice to refile at a later date and ordered that Spinka pay plaintiffs' costs.

On November 24, 1975, plaintiffs filed a new petition for a rule to show cause together with attached affidavits alleging a series of new violations. Spinka did not contest the factual allegations in the petition or the affidavits supporting it, and a

rule to show cause was issued. He instead filed a motion to strike the petition on the grounds that it failed to state whether the contempt charged was direct or indirect, whether civil or criminal, and if criminal, whether it was in the nature of a felony or a misdemeanor. Spinka further stated that the action was not being properly prosecuted because it was not brought by the Attorney General of Illinois or the State's Attorney of Cook County. Alternatively, he entered a plea of not guilty and moved for a jury trial. The trial court denied the motion to strike and the motion for a jury trial, stating in its order that the matter would not be regarded as a serious criminal contempt and any penalty imposed would not exceed six months confinement. Spinka also filed an affirmative defense and cross-complaint, "on his own behalf and on behalf of all other persons similarly situated," asking that the court dismiss the contempt proceeding and find that the provisions of the Illinois Dental Practice Act which plaintiffs sought to enforce were unconstitutional insofar as they arbitrarily and unreasonably prohibited persons from practicing "denture therapy" without a license. On September 13, 1976, following a hearing, the trial court granted plaintiffs' motion to strike the affirmative defense and counterclaim and found that Spinka's constitutional issues were not well taken. The court further found him to be in contempt of the 1968 injunction as charged, sentenced him to ten days confinement in the Cook County Jail, and entered a judgment for costs against him totalling $1,100. He appeals from this order and all previous adverse judgments and orders.

OPINION

Defendant first contends that since the provisions of the Dental Practice Act upon which the 1968 injunction was based are unconstitutional, the injunction should be declared void and the trial court's order of contempt should be reversed. The trial court, in its contempt order, found that defendant's constitutional arguments were not well taken. Plaintiffs have correctly argued, however, that this finding was unnecessary, since the issue of the Dental Practice Act's constitutionality was not properly before the trial court and similarly should not be considered by this court on appeal. It is clear that when a court of equity with proper jurisdiction over the subject matter and the persons issues an injunction, that injunction, however erroneous it may be, must be obeyed until it is set aside; disobedience of it is properly punishable as a contempt. (Board of Education of Kankakee School Dist. No. 111 v. Kankakee Federation of Teachers, Local No. 886 (1970), 46 Ill. 2d 439, 264 N.E.2d 18, cert. denied (1971), 403 U.S. 904, 91 S.Ct. 2203, 29 L. Ed.2d 679.) The injunction must be obeyed even though the alleged error concerns a deprivation of constitutional rights. (Bd. of Trustees of Community College Dist. No. 508, County of Cook v. Cook County College Teachers Union, Local 1600, AFT, AFL-CIO (1976), 42 Ill. App. 3d 1056, 356 N.E.2d 1089.) At no point since the 1968 consent decree of injunction was entered has there been any question raised as to the proper jurisdiction of the issuing court. It should also be noted that no notice of appeal of that decree was filed within the 30 day period prescribed by Supreme Court Rule 303. (Ill. Rev. Stat. 1975, ch. 110A, par. 303.) Defendant took no legal action whatsoever until the instant contempt proceeding was brought against him at which point he raised a constitutional claim in an effort

to collaterally attack the injunction. It is a well established rule that the only issue before the court in a contempt proceeding is whether the defendant could properly be found to have violated the court's order, and that a collateral attack on that order may not be made. (United Mine Workers of America Union Hospital v. United Mine Workers of America Dist. No. 50 (1972), 52 Ill. 2d 496, 288 N.E.2d 455; Board of Junior College Dist. No. 508, County of Cook v. Cook County College Teachers Union, Local 1600 (1970), 126 Ill. App. 2d 418, 262 N.E.2d 125, cert. denied (1971), 402 U.S. 998, 91 S.Ct. 2168, 29 L.Ed.2d 165.) In light of the fact that defendant has not contested any of the factual allegations made against him in plaintiffs' petition, we must conclude that the trial court's finding that defendant was in contempt of the court's permanent injunction should be affirmed as being in accord with the manifest weight of the evidence. See, Schulenburg v. Signatrol, Inc. (1967), 37 Ill. 2d 352, 226 N.E.2d 624.

The only possible exception to the rule that an erroneous or even unconstitutional injunction which was entered under proper jurisdiction must nevertheless be obeyed is where the injunction is transparently invalid or has only a frivolous pretense to validity. (See, Walker v. City of Birmingham (1967), 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210.) We find that the facts here do not fall within this exception. In his attack on the injunction, defendant has relied on and quoted extensively from legislation entitled the "Denture Therapists Act," enacted in 1974 by the Legislative Assembly of Ontario, Canada, which recognized denture therapy as a separate distinct profession and provided for the licensing of denture therapists. Defendant argues that in comparison to the more recently

enacted Canadian legislation, the Illinois Dental Practice Act, insofar as it does not recognize "denture therapy" as a separate profession and requires that those who practice it or other forms of dentistry be properly licensed, is therefore arbitrary, unreasonable and unconstitutional. It is clear, however, that the Canadian legislation could not be considered by this or any other Illinois court, since it is only in the absence of Illinois authority on the point of law in question that the courts of Illinois will look to the law of other jurisdictions as persuasive authority. (Atwood Vacuum Mach. Co. v. Continental Cas. Co. (1969), 107 Ill. App. 2d 248, 246 N.E.2d 882; Illinois Nat'l Ins. Co. v. Rose (1968), 93 Ill. App. 2d 329, 235 N.E.2d 675.) The constitutionality of the Illinois Dental Practice Act as a valid exercise of the police power has been affirmed by the Illinois Supreme Court and by this court. (See, People ex rel. Chicago Dental Soc'y v. A.A.A. Dental Laboratories, Inc. (1956), 8 Ill. 2d 330, 134 N.E.2d 285; People ex rel. Illinois State Dental Soc'y v. Vinci (1976), 35 Ill. App. 3d 474, 342 N.E.2d 206.) There is therefore no basis whatsoever for concluding that the injunction enforcing the provision of the Dental Practice Act was transparently invalid and need not have been obeyed.

Defendant next contends that his motion to strike the petition for rule to show cause should have been allowed. He argues that the petition was defective in that it did not specify whether the contempt which it alleged was criminal or civil, serious or minor, or what punishment, if any, was sought. Defendant admits that in the trial court's order denying his motion to strike and his alternative request for a jury trial, he was advised by the court that the proceeding would not be regarded as a serious criminal contempt, and

that the penalty imposed, if any, would not exceed confinement of six months. The court's order correctly informed defendant that although the matter was brought to punish him for disobeying an injunction and was, therefore, a criminal contempt (People ex rel. Chicago Bar Assoc. v. Barasch (1961), 21 Ill. 2d 407, 173 N.E.2d 417), the contempt was minor, and a jury trial would be properly denied. (People ex rel. Illinois State Dental Soc'y v. Taylor (1971), 131 Ill. App. 2d 492, 268 N.E.2d 463.) Although he characterizes plaintiffs' petition as "defective," defendant has not alleged that he was not sufficiently informed of the nature of the charges against him, or that he was rendered unable to sufficiently prepare his defense or file his answer. In view of the trial court's order discussed above, it is difficult to find that defendant suffered any prejudice as a result of the "defects" which he alleges. We therefore conclude that his motion to strike was properly denied.

Finally, defendant contends that the contempt proceeding was not properly instituted. He first argues that the court lacked jurisdiction to conduct the proceeding, because while section 17a of the Dental Practice Act (Ill. Rev. Stat. 1975, ch. 91, par. 71a) provides that a suit may be filed to perpetually enjoin any person from unlawfully practicing dentistry, neither that section nor any other section of the Act provides that criminal contempt proceedings may be instituted to punish persons who violate an injunction which may be issued. This argument is without merit. The power to punish for contempt is an inherent and essential power in all courts, and exists independently of any statute. (People v. Javaras (1972) 51 Ill.2d 296, 281 N.E.2d 670.) It was fully within the power and

jurisdiction of the trial court to punish defendant for his admitted disobedience of the injunction which it had previously issued.

Defendant's remaining argument, which is that since the proceeding was brought on the relation of the Illinois State Dental Society and not by the correct public official it was therefore not properly prosecuted, is also without merit. Section 17a of the Dental Practice Act (Ill. Rev. Stat. 1975, ch. 91, par. 71a) declares the unlicensed practice of dentistry to be a public nuisance and authorizes an action to enjoin such practice to be maintained by the Illinois Attorney General, State's Attorney of any county, or any resident citizen. On appeal, defendant has, in his words, "suggested" that the Illinois State Dental Society is not a resident citizen of Illinois. This allegation that plaintiff lacked the capacity to institute the proceeding would give rise to a defense which would be subject to waiver unless raised at the earliest moment at trial. (See, Zimmerman Ford, Inc. v. Cheney (1971), 132 Ill. App. 2d 871, 271 N.E.2d 682.) Since the question of whether the Illinois State Dental Society qualified as a resident citizen of Illinois was never raised at trial, but was brought up for the first time on this appeal, the issue has not been properly preserved for review.

Based on the foregoing the judgment of the circuit court is affirmed.

Affirmed.

SULLIVAN, P.J. and MEJDA, J., concur.

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1042

PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN C. WATSON, DIRECTOR OF THE DEPARTMENT OF REGISTRATION AND EDUCATION, AND THE ILLINOIS STATE DENTAL SOCIETY,
Respondents,

vs.

ALAN SPINKA, INDIVIDUALLY AND DOING BUSINESS AS NORTH GRAND DENTAL LABORATORY AND B & S DENTAL LABORATORY,
Petitioners.

ALAN SPINKA, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,
Cross-Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. JOHN C. WATSON, DIRECTOR OF THE DEPARTMENT OF REGISTRATION AND EDUCATION, AND THE ILLINOIS STATE DENTAL SOCIETY,
Cross-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Cross-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Respondents, People of the State of Illinois ex rel. John C. Watson, Director of the Department of Registration and Educa-

tion, and the Illinois State Dental Society, answer the Petition for a Writ of Certiorari to the Supreme Court of Illinois and respectfully submit that the Petition does not meet the jurisdictional requirements of Section 1257(3) of Title 28 of the United States Code, and, alternatively, that there is no substantial federal question involved which would justify this Court's review.

STATEMENT OF THE CASE.

This action was first brought by respondents to enjoin Alan Spinka from practicing dentistry without a license in the State of Illinois, and the trial court granted a permanent injunction enjoining Spinka from engaging in such activity. Respondents subsequently filed a Petition for Rule to Show Cause why Spinka should not be found guilty of contempt of court for having violated the injunction, and Spinka responded by filing an Affirmative Defense and Counterclaim on his own behalf and "on behalf of all others similarly situated." This pleading asserted that the Legislative Assembly of The Province of Ontario, Canada enacted the Denture Therapists Act of 1974, which provides a licensing procedure enabling persons to practice denture therapy and that, therefore, the Illinois courts should recognize the denture therapist as a member of a professional group independent of the dental profession and hold the Illinois Dental Practice Act unconstitutional on the ground that it arbitrarily and unreasonably deprives Spinka and all others similarly situated of their right to earn a living in their profession without due process of law.

After a full hearing on respondent's motion to strike and dismiss the counterclaim, the trial court granted the motion and also specifically recited that it had considered Spinka's constitutional issues and had found them not well taken. On Spinka's election not to contest the factual allegations in the Petition for Rule to Show Cause and supporting affidavits, the trial court found Spinka in contempt of court for having violated the injunction and entered a judgment against Spinka for costs and ten days' confinement in the Cook County jail.

Spinka appealed to the Illinois Appellate Court seeking a reversal of the trial court judgment on the ground that the Illinois Dental Practice Act (Ill. Rev. Stat. 1975, ch. 91, pars.

56-72), upon which the original injunction was based, is unconstitutional and void to the extent that it deprived Spinka and others similarly situated of their property and liberty without due process of law. The Appellate Court affirmed the trial court judgment, stating that the issue of the constitutionality of the Dental Practice Act was not properly before the trial court or the reviewing court because Illinois case law holds that an injunction, no matter how erroneous, must be obeyed until set aside. The Appellate Court did, however, go on to state that the constitutionality of the Dental Practice Act as a valid exercise of police power had been affirmed by both the Illinois Supreme Court and the Illinois Appellate Court.

Spinka then filed a Petition to Appeal as a Matter of Right to the Illinois Supreme Court, arguing that the Appellate Court had refused to consider the constitutionality of the Dental Practice Act and that such refusal—an alleged violation of his due process rights—raised a constitutional issue for the first time as a result of the action of the Appellate Court and, thus, was appealable to the Illinois Supreme Court as a matter of right. The Illinois Supreme Court denied the Petition to Appeal as a Matter of Right and this Petition for a Writ of Certiorari followed.

ARGUMENT.

I.

THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS DOES NOT MEET THE JURISDICTIONAL REQUIREMENTS OF SECTION 1257(3) OF TITLE 28 OF THE UNITED STATES CODE.

Section 1257(3) of Title 28 of the United States Code provides, in pertinent part, that this Court may review a final judgment of the Illinois Supreme Court by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States". Apparently, the thrust of Petitioner Spinka's argument is that the Illinois Supreme Court's denial of his Petition to Appeal as a Matter of Right from a constitutional issue which purportedly arose for the first time as a result of the action of the Illinois Appellate Court was a violation of his procedural rights without due process of law such that the requirements of Section 1257(3) would be satisfied.

This jurisdictional requirement is not met, however, because the Illinois Supreme Court's denial of the Petition to Appeal as a Matter of Right was not violative of any of Spinka's procedural rights. No constitutional issue arose for the first time as a result of the action of the Illinois Appellate Court, and, therefore, Spinka was not entitled to an appeal to the Illinois Supreme Court as a matter of right. Constitution of the State of Illinois, Article 6, Section 4(c).

Spinka's argument to the Appellate Court was that the contempt order was invalid because the injunction was based upon an allegedly unconstitutional statute. This argument was rejected by the Appellate Court on several grounds, one of which was

that it was an improperly presented collateral attack on the propriety of the original injunction. This holding is supported by Illinois case law which cites the general rule that any order made by a court in the proper exercise of its jurisdiction must be obeyed, even if it has been erroneously entered, until it is reversed or set aside in a direct proceeding for that purpose. *Holms* v. *Kammerman,* 10 Ill. App. 2d 450, 135 N. E. 2d 162 (1st Dist. 1956). This Court has held to the same effect in *United States* v. *United Mine Workers of America,* 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947):

> . . . we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In Howat v. Kansas, 258 U.S. 181, 190, 66 L.Ed. 550, 559, 42 S.Ct. 277 (1922) this Court said:
>
> > "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decisions are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." [330 U.S. at 293, 91 L.Ed. at 912.]

The injunction first entered against Spinka was not appealed. In fact, the injunction was entered pursuant to a Consent Decree of Injunction. Therefore, the only issue before the trial court on the contempt proceeding was whether an injunction had been previously entered and, if so, whether Spinka had violated that injunction. *People* v. *Spounias,* 20 Ill. App. 2d 184, 155 N. E. 2d 326 (3d Dist. 1959). The constitutionality of the statute upon which the injunction was based is not properly at issue.

Spinka here argues, however, that insofar as a case involving the punishment of a crime is concerned, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings. *People* v. *Sarelli,* 55 Ill. 2d 169, 302 N. E. 2d 317 (1973). The case at bar, though, does not involve the punishment of a crime but, rather, a petty offense. The case herein involves a contempt proceeding for the violation of an injunction, and the trial court advised Spinka prior to the hearing that it would not regard the purported contempt as a serious criminal contempt and that the penalty imposed, if any, would not exceed six months' confinement. In fact, the penalty imposed upon the finding of contempt was ten days' confinement, a penalty well within what this Court has determined proper for a petty offense. *Cheff* v. *Schnackenberg,* 384 U. S. 373, 16 L. Ed. 2d 629, 86 S. Ct. 1523 (1966). The Illinois Supreme Court has followed the *Cheff* opinion in *County of McLean* v. *Kickapoo Creek, Inc.,* 51 Ill. 2d 353, 282 N. E. 2d 720 (1972).

In any event, the *Sarelli* holding is not supportive of Spinka's position that a constitutional issue may be raised at any time. In *Sarelli,* the defendant was convicted of the unlawful sale of marijuana and on appeal, he questioned the sufficiency of the evidence, but not the constitutionality of the statute under which he was convicted. After the appellate court affirmed his conviction, the Illinois Supreme Court held unconstitutional the classification of marijuana as a narcotic drug. When the defendant filed a petition under the Illinois Post-Conviction Hearing Act asserting that he was convicted under an unconstitutional statute, the People objected on the ground that the defendant had waived the issue of the unconstitutionality of the statute because he had not raised it previously. Although the Illinois Supreme Court allowed the defendant's post-conviction petition to raise the constitutional issue for the first time, such holding was based upon the fact that the statute involved had

already been held unconstitutional in a separate proceeding. The *Sarelli* holding, in effect, allowed the retroactive application of a finding of unconstitutionality. The *Sarelli* holding does not allow a party, as Spinka here attempts, to challenge the constitutionality of a statute at any point in the proceedings when the statute involved is yet held valid.

Therefore, Spinka's attempt to raise the issue of the constitutionality of the Dental Practice Act in the Appellate Court was improper, and that court's action as concerns the constitutionality issue was not a violation of Spinka's due process rights and did not raise a further constitutional issue in that court for the first time. Thus, Spinka was not entitled to appeal to the Illinois Supreme Court as a matter of right, and that court's refusal of the Petition does not raise a constitutional issue as would form the basis for jurisdiction in this Court under Section 1257(3).

II.

PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED, AND NO SUBSTANTIAL FEDERAL QUESTION IS HERE INVOLVED WHICH WOULD JUSTIFY THIS COURT'S REVIEW.

Even if this Court's jurisdiction were properly invoked, there is no doubt but that Spinka's due process rights were not invaded. Although the constitutionality of the Dental Practice Act was not properly brought into issue during the contempt proceeding, both the trial and the appellate courts reviewed Spinka's constitutional argument and rejected it. The trial court's order specifically recited that it had considered Spinka's constitutional issues and had found them without merit, and the Appellate Court noted that the constitutionality of the Illinois Dental Practice Act had been affirmed by both the Illinois Appellate Court and the Illinois Supreme Court. *People ex rel.* v. *A. A. A. Dental Lab.*, 8 Ill. 2d 330, 134 N. E. 2d 285 (1956), appeal dismissed, 352 U. S. 863, 1 L. Ed. 2d 73, 77 S. Ct. 97

(1956), U. S. *rehrg. den.*, 352 U. S. 919; *People ex rel. Ill. State Dental Society* v. *Vinci*, 35 Ill. App. 3d 474, 342 N. E. 2d 206 (1st Dist. 1976). [Appendix, p. 7A, Petition for Writ of Certiorari.]

In fact, not only have the Illinois Appellate and Illinois Supreme Courts upheld the constitutionality of the Dental Practice Act as a valid exercise of the police power, but the federal district court sitting in the Northern District of Illinois has held the Illinois Supreme Court's finding of constitutionality binding as concerns the Illinois constitution and persuasive as concerns the federal constitution. *Duncan* v. *Ward*, 225 F. Supp. 195 (N. D. E. D. Ill. 1963).

Spinka was not denied due process of law because even if he were entitled to raise the issue of the constitutionality of the Dental Practice Act during the contempt proceeding, he actually had a hearing on such issue in both the trial and the appellate courts, and the decisions of those courts in rejecting the constitutional issue raised were in conformance with prior determinations of the Illinois Supreme and the Illinois Appellate Courts. Therefore, there is no substantial federal question which would justify a review by this Court.

CONCLUSION.

We submit that for the reasons stated above and in accordance with the authorities cited, the Petition for a Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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